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The Supreme Court and the Tort Claims Act: End of an Enlightened Era

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THE SUPREME COURT AND THE TORT CLAIMS ACT: END OF AN ENLIGHTENED ERA?

IN 1946, AFTER YEARS OF UNSUCCESSFUL ATTEMPTS to grant citizens the right to hold the federal government liable for its torts, Congress passed the Federal Tort Claims Act (FTCA).[1] It was by far the broadest waiver of sovereign immunity ever granted by Congress. Prior, more limited waivers of immunity had been granted through the enactment of the Tucker Act,[2] the Suits in Admiralty Act[3] and the Public Vessels Act.[4] The Act proclaimed that the United States would be liable for

> claims against the United States for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[5]

The congressional waiver of the sovereign immunity of the United States was not absolute, however. Congress excluded from judicial review twelve types of government actions, which it deemed necessary for the unimpeded operation of governmental activities.[6] By far the most significant one, and the one resulting in the most litigation, has been the "discretionary function exception", which protects the United States from liability for the acts or omissions of government employees, taken pursuant to a statute or regulation, involving the performance or failure of performance of a discretionary function or duty, regardless of whether or not the discretion involved was abused.[7]

The fact that Congress did not completely waive immunity from suit has resulted in a problem in determining the proper scope of statutory interpretation; that is, should the FTCA be strictly construed as a limited waiver of immunity or more broadly interpreted as a blanket consent to suit with certain statutory exceptions?[8] Since the legislative history was generally

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[1] Pub. L. No. 79-601, §§ 401-22, 60 Stat. 842 (1946) (codified at 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-78, 2680 (1976)). For a review of the legislative history of the Federal Tort Claims Act (FTCA), *see* Gottlieb, *The Federal Tort Claims Act — A Statutory Interpretation*, 35 GEO. L. J. 1, 2-9 (1946).

[2] Ch. 359, 24 Stat. 505 (codified in scattered sections of 28 U.S.C.).

[3] Act of March 9, 1920, Ch. 95, 41 Stat. 525 (codified at 46 U.S.C. §§ 741-52 (1970 & Supp. V 1975)).

[4] Act of March 3, 1925, Ch. 428, 43 Stat. 1112 (codified at 46 U.S.C. §§ 781-90 (1970)).

[5] 28 U.S.C. § 1346(b)(1976).

[6] The exceptions, currently thirteen, are codified at 28 U.S.C. § 2680 (1976).

[7] 28 U.S.C. § 2680(a)(1976).

[8] Reynolds, *Strict Liability Under the Federal Tort Claims Act: Does "Wrongful" Cover a Few Sins, No Sins, or Non-Sins?*, 23 AM. U. L. REV. 813, 819 (1974).

inconclusive as to the congressional intent on this point,[9] the Supreme Court struggled with this question throughout the early history of the FTCA. The Court eventually adopted a statutory construction that clearly favored the view that the FTCA should be interpreted as a broad waiver of immunity, with a correspondingly narrow view of the application of its statutory exceptions.[10]

The Supreme Court has not been consistent in the use of this broad construction however. Recent decisions of the Court interpreting the FTCA, including *Laird v. Nelms*[11] and *Stencel Aero Engineering Corp. v. United States*,[12] and to a lesser extent, *Logue v. United States*[13] and *United States v. Orleans*,[14] indicate a definite shift away from the Supreme Court's broad view of the Act, towards a much narrower concept of governmental tort liability. It is the purpose of this note to document and analyze this rather drastic shift in construction of the FTCA, in light of the past precedents, legislative history and public policy.

I. Congressional Abrogation of the Doctrine of Sovereign Immunity

Before examining the Supreme Court's various interpretations of the FTCA, it is appropriate to closely consider the desirability of, and justifications for, construing the statute strictly or broadly. The dichotomy is represented in the following contrasting statements: "the rule of liberal construction is to be applied to exceptions contained in the Federal Tort Claims Act so as not to impose liability upon the Federal Government in instances where it is apparent that Congress saved or reserved governmental immunity,"[15] (a statement of the narrow view) and "where a statute contains a clear and sweeping waiver of immunity from suit on all claims with certain well-defined exceptions, resort to that rule [of strict construction] cannot be had in order to enlarge the exceptions"[16] (illustrative of the broader interpretation).

Consideration of the various interpretations of the FTCA necessarily involves an examination of the doctrine of sovereign immunity. Although an in-depth discussion of the concept is beyond the scope of this note, a brief evaluation is necessary since, generally speaking, a broad interpretation of the FTCA will deny application of the doctrine while a strict interpretation will maintain it.

Sovereign immunity is rooted in the English common-law idea that the

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[9] Dalehite v. United States, 346 U.S. 15, 29-30 (1953); Feres v. United States, 340 U.S. 135, 138 (1950).

[10] *See* discussion in text accompanying notes 43-97, *infra*.

[11] 406 U.S. 797 (1972).

[12] 431 U.S. 666 (1977).

[13] 412 U.S. 521 (1973).

[14] 425 U.S. 807 (1976).

[15] Mid-Central Fish Co. v. United States, 112 F. Supp. 792, 796 (W.D. Mo. 1953).

[16] Employer's Fire Ins. Co. v. United States, 167 F.2d 655, 657 (9th Cir. 1948), *quoted in* United States v. Yellow Cab Co., 340 U.S. 543, 548-49 n.5 (1951).

"King can do no wrong."[17] The doctrine has been judicially recognized in the United States since 1821.[18] However, throughout the 20th century, the theory of governmental immunity has been highly criticized by many legal scholars.[19] It has been declared unnecessary, since the governments of other countries that do not recognize sovereign immunity manage to function effectively.[20] It is asserted that sovereign immunity results in the inefficient administration of injury claims, in the sense that it prevents courts from resolving controversies for which they are especially well suited.[21] Looking at it from another point of view, sovereign immunity is said to violate the modern concept that entities engaging in enterprises that can cause injury to innocent victims ought to bear the cost of the damage of those activities.[22] And from an economic point of view, organizations and governments that cause these injuries are asserted to be much better able to distribute the cost and bear the risk than those who actually suffer injury.[23]

The most serious criticism of the doctrine of sovereign immunity is simply that it is unjust, because it forces an individual who is injured by the negligence of a government employee to absorb the cost of that injury without compensation from the government. As one commentator has put it, "[i]t ought to be fundamental in a democracy that an individual who is injured should not be deprived of redress merely because he was injured by governmental activity."[24]

On the other hand, few commentators would advocate the complete abolition of sovereign immunity. It is generally agreed that there is a line beyond which the waiver of immunity should not extend, beyond which governmental operations would be impaired.[25] As Dean Pound has stated,

> [i]t is a crucial problem in the interpretation and application of the Federal Tort Claims Act to give adequate relief to the victims of injury inflicted upon them by agencies and operations under the control of the federal government and yet avoid impairment of the full efficacy of that control for its public and social purposes.[26]

Two general justifications are usually put forth in support of at least a limited form of sovereign immunity. The first, as has been suggested, is that subjecting governments to private litigation would seriously impair the

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[17] 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.01 (1958).

[18] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

[19] *See* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.00 (Supp. 1976); STREET, GOVERNMENTAL LIABILITY (1953); Borchard, *Government Liability in Tort* (pts. 1-3), 34 YALE L.J. 1, 129, 229 (1924-1925); Borchard, *Government Responsibility in Tort* (pts. 4-6), 36 YALE L.J. 1, 757, 1039 (1926-1927).

[20] Schwartz, *Public Tort Liability in France*, 29 N.Y.U.L.R. 1432 (1954).

[21] Borchard, *Government Responsibility in Tort*, 36 YALE L.J. 757, 803 (1926).

[22] Pound, *The Tort Claims Act: Reason or History?*, 30 NACCA L.J. 404, 418 (1963).

[23] Note, *Utility, Fairness and the Takings Clause: Three Perspectives on* Laird v. Nelms, 59 VA. L. REV. 1034, 1055 (1973).

[24] Mikva, *Sovereign Immunity: In a Democracy The Emperor Has No Clothes*, 1966 U. ILL. L.F. 828, 847.

[25] 2 HARPER & JAMES, LAW OF TORTS § 29.3 (1956).

[26] Pound, *supra* note 22, at 416.

efficient function of governmental bodies and cause a loss of control by the executive bodies of their statutory responsibilities.[27] The theory is that government officials should be protected from judicial scrutiny in those areas where they must be free to make policy and experiment; the possibility of governmental liability resulting from official action would tend to inhibit the freedom and independence of government officials and reduce their efficiency.[28] A corollary of this point is that the judiciary is necessarily ill-equipped to scrutinize and pass judgment on policy decisions and thus sovereign immunity furthers the constitutional doctrine of separation of powers.[29]

To the extent this view is valid, the existence of the "discretionary function exception" to the FTCA would seem adequate to protect the interests of the United States.[30] Although the legislative purpose in enacting the discretionary function exception is somewhat uncertain,[31] the federal courts have adopted a construction of the Act that distinguishes between governmental activity in a policy-formulation setting which is protected and that which is merely an execution of that policy, which is not.[32] The discretionary function exception would seem to be adequate protection for the United States against judicial interference in the performance of legislative and administrative activities, and any interpretation of the FTCA tending to expand this protection is unnecessary.

The second justification advanced in defense of sovereign immunity is that to allow recovery against the government would threaten a raid on the federal treasury, endanger important policies and goals, and ultimately affect the stability of the government.[33] The response to this has been that the absence of immunity has not bankrupted the treasuries of those countries which have allowed for almost unlimited recovery.[34] In addition, the existence of a legislative mechanism for compensation through the device of private petitions to Congress for relief [35] results in the federal government spending large amounts to vindicate many claims not covered under the FTCA.[36] To

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[27] Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060, 1061 (1946). *See also*, Larson v. Domestic & Foreign Commerce, 337 U.S. 682 (1949).

[28] Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81, 121 (1968).

[29] *Id.* at 121-22.

[30] Some commentators believe that even the discretionary function is unnecessary to protect the interests of the United States. For articles calling for the abolishment or modification of the discretionary function exception, *see* Mikva, *supra* note 24, at 838; Peck, *The Federal Tort Claims Act — A Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. 207 (1956); 2 HARPER & JAMES, *supra* note 25, at § 29.15.

[31] Reynolds, *supra* note 28, at 83-84.

[32] *See generally*, Reynolds, *supra*, note 28; Comment, *Federal Tort Claims Act: Discretionary Function Revisited*, 31 U. MIAMI L. REV. 161 (1976).

[33] Schwartz, *supra* note 20, at 1457.

[34] *Id.*

[35] Congress' power to enact private legislation affording compensation for claimants stems from Article 1, Section 8 of the Constitution, the congressional power to pay the debts of the United States. *See* Gellhorn and Lauer, *Federal Liability for Personal and Property Damage*, 29 N.Y.U. L. REV. 1325, 1328 (1954).

[36] The best example of this is the congressional action taken to compensate the thousands of claimants injured in the Texas-City disaster, who were denied relief by the United States

the extent that the government pays for its torts anyway, the argument that sovereign immunity is necessary for the fiscal security of the nation loses considerable force.[37]

This brief summary highlights the injustice of denying recovery against the United States for its torts. In light of the fact that sovereign immunity is largely unnecessary and unfair, and the fact that any need for it is met in the tort area by the discretionary function exception to the FTCA, it is clear that when a legislative body acts to waive its sovereign immunity, judicial attempts to resurrect the doctrine through a strict construction of the waiver, and an expansive view of the exceptions are unwarranted.

In considering the interpretation of a statute, the courts, of course, should not overlook the purposes of the legislative body in passing the legislation. It is generally agreed that two considerations prompted Congress to pass the FTCA. The first was a desire by Congress to mitigate the unjust consequences of sovereign immunity and extend a judicial remedy to those who previously had none.[38] Congress was well aware of the injustice suffered by those who were unfortunate enough to incur injury at the hands of negligent federal employees, and were forced to bear the burden and cost of such injuries themselves.

Equally as important in the passage of the Act was the desire of Congress to rid itself of the time-consuming, inefficient and often inequitable process of reviewing private bills for relief.[39] Such bills were the only recourse for those injured by the tortious acts of the government, and by the 1940's Congress was receiving over a thousand petitions for relief each year.[40] Passage of the Act was a recognition of the fact that the judiciary was in a much better position to dispose of those claims than was a legislative body.[41]

These considerations of Congress in passing the Act are persuasive support for a judicial adoption of an expansive view of the FTCA, since any interpretation which denies recovery necessarily frustrates the congressional purposes underpinning the FTCA. Of course, standing alone they would require liability against the United States in all cases; obviously such a suggestion is not made. Rather, the purposes must be weighed in the balance in each case, with their full weight directed against narrow judicial interpretations of the FTCA. In light of the statutory purposes, rules of construction,[42] the overwhelming equities on behalf of the claimants, and the

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Supreme Court in Dalehite v. United States, 346 U.S. 15 (1953). *See* discussion in text accompanying notes 55-63 *supra*. Congress allowed recovery, with a maximum limit of $25,000 per claimant. *See* Texas City Disaster — Settlement of Claims. PUB. L. No. 378, 69 Stat. 707 (1955). *See generally* Gellhorn and Lauer, *Congressional Settlement of Tort Claims Against the United States*, 55 COL. L. REV. 1 (1955).

[37] Schwartz, *supra* note 20, at 1458.

[38] *See* Feres v. United States, 340 U.S. 135, 139-40 (1950); Indian Towing Co. v. United States, 350 U.S. 61, 68-69 (1955); Rayonier, Inc. v. United States, 352 U.S. 315, 319-20 (1956).

[39] *See* United States v. Yellow Cab Co., 340 U.S. 543, 549-50 (1951). *See also, Hearings on H.R. 5373 and H.R. 6463 Before the House Committee on the Judiciary*, 77th Cong., 2d Sess., at 29-30 (1942). *See generally*, Gottlieb, *supra* note 1 at 2-9.

[40] H.R. REP. No. 1287, 79th Cong., 1st Sess. at 2 (1945).

[41] Dalehite v. United States, 346 U.S. 15, 25 n.9 (1953).

[42] Another consideration in favor of a broad view of the FTCA and a narrow view of the statutory exceptions is the maxim of statutory construction, *expressio unius est exclusio alterius*, which would result in a presumption that those activities not included in the statutory exceptions

protection of necessary legislative and administrative operations and functions through the discretionary function exception, a broad construction of the FTCA which favors limiting the express statutory exceptions to their language, is well-founded.

II. Early Interpretations of the FTCA

The Supreme Court's initial interpretations of the FTCA gave some indication that the Court would liberally construe the coverage of the Act, but the cases were not consistent. The Court first interpreted the substantive provisions of the FTCA in the case of *Brooks v. United States*.[43] *Brooks* involved a suit against the army for damages as a result of the alleged negligence of a civilian employee of the Army in driving an Army truck that had collided with the plaintiff's car. The plaintiff, Brooks, was himself a serviceman, on furlough, not on military business. The Court granted recovery against the government, holding that the FTCA allowed servicemen who received injuries "not incident to their service" to obtain damages. In *Brooks*, the Court utilized a three-step analysis in determining whether the particular claim came within the waiver of sovereign immunity. This analysis consisted of the following inquiry: (1) whether the claim was within the clear language of the waiver; (2) whether the claim was barred by any of the statutory exceptions; (3) whether there was external evidence that Congress did not intend to bring the particular claim within the reach of the FTCA.

The Court noted that "[t]he statute's terms are clear. They provide for District Court jurisdiction over any claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen.' "[44] The Court went on to note that none of the exceptions barred the claim, and that Congress could not be seen to have intended to exclude the claims of servicemen.[45] Nevertheless, the majority reserved opinion on the situation of a plaintiff serviceman injured in the course of his duties.

That issue came to the Court one year later in *Feres v. United States*.[46] In *Feres*, the executrix of a serviceman killed in a barracks fire attempted to recover damages from the United States on the theory that the military had negligently quartered him in a dangerous facility.[47] Writing for a unanimous Court, Justice Jackson held that the Federal Tort Claims Act did not apply to

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are necessarily excluded from those exceptions and are thus covered within the provisions of the FTCA. *See* Gottlieb, *supra* note 1, at 53.

[43] 337 U.S. 49 (1949).

[44] *Id.* at 51.

[45] Particular emphasis was placed on the fact that the vast majority of tort claims bills introduced into Congress between 1925 and 1935 contained exceptions denying recovery to servicemen, but the FTCA in its final form did not include such exceptions. *Id.* at 51-52.

Another issue that the Court considered in interpreting congressional intent was whether an FTCA remedy was consistent with other existing statutory schemes of compensation. Cognizant of the fact that Brooks was receiving veteran's benefits, the Court refused to find that those benefits were his exclusive remedy, stating that "[w]e will not call either remedy in the present case exclusive, nor pronounce a doctrine of election of remedies, when Congress has not done so." *Id.* at 53. However, the Court did remand the case to the lower court to inquire whether damages should be reduced by the amount of disability benefits already paid.

[46] 340 U.S. 135 (1950).

servicemen who sustained injuries incident to the performance of their military duties, despite the fact that their injuries may have been negligently inflicted. Noting that there was little relevant legislative history, the Court construed the Act "to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole."[48] In so doing, the Court implied an exception to the FTCA, by concluding that Congress could not have intended to allow recovery in this type of situation. Factors the Court considered with respect to that determination included (1) the conclusion that the government was only liable to the extent of a private individual, and since no private individual had the power to conscript, there was no possibility of private liability and thus no governmental liability; (2) that since the relationship of a government to its servicemen was "distinctively federal" in character, the requirement of the Act that state law determine tort liability must be inapplicable; and (3) that the existence of a "simple, certain and uniform" system of compensation[49] for the injuries suffered by servicemen would make recovery of damages under the FTCA duplicative and costly to the government.[50]

Feres was a retreat from the interpretation used in *Brooks* in the sense that the *Feres* Court found, unlike the *Brooks* Court, that Congress intended to exclude additional claimants under the FTCA — servicemen in the line of duty — beyond those specifically excluded from coverage. In addition, by finding that the FTCA could not be meant to apply because of the distinctively federal character of the relationship between the military and its servicemen, the Court read narrowly the requirement that the United States was liable according to state law, to the extent that a private party would have been liable under similar circumstances. These rationales were not destined to remain.

A year after *Feres*, in a non-military context, the Court decided the case of *United States v. Yellow Cab Co.*, [51] which presented the procedural issue of whether the United States would be liable for indemnity or contribution. In determining that the United States could be liable for contribution, the Court gave notice that it embraced a broad conception of the Act. In an oft-cited statement, the Court asserted that "[t]he Federal Tort Claims Act waives the Government's immunity from suit in sweeping language."[52] The Court also stated:"where a statute contains a clear and sweeping waiver of immunity from suit on all claims with certain well-defined exceptions, resort to that rule [of strict construction] cannot be had in order to enlarge the exceptions."[53]

The Court again utilized the three-step analysis employed in *Brooks*,

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[47] Decided together with *Feres* were Jefferson v. United States and United States v. Griggs, both of which involved claims of medical malpractice.

[48] 340 U.S. at 139.

[49] The Court was referring to the various statutes passed by Congress designed to compensate members of the military for injuries received while in service. For a list of these statutes, *see* 340 U.S. at 144 n.12.

[50] 340 U.S. at 140-44. *See* Jacoby, *The* Feres *Doctrine*, 24 HASTINGS L. J. 1281, 1284 (1973).

[51] 340 U.S. 543 (1951).

[52] 340 U.S. at 547.

[53] 340 U.S. at 548-49 n.5 (quoting Employer's Fire Ins. Co. v. United States, 167 F.2d 655, 657 (9th Cir., 1948)).

noting that the claim for contribution was covered by the Act and not included within the exceptions to the Act, and rejecting a reading of the legislative history that would exclude such claims. The Court noted the general trend toward a liberal construction of the consent to suit and felt that it would be "inconsistent to whittle it down by refinements."[54]

The *Yellow Cab* case supported the position that the sovereign's waiver of immunity was to be strictly construed against the sovereign. Two years later, however, the Court decided the famous case of *Dalehite v. United States.*[55] *Dalehite* was one of over 300 actions brought against the United States under the FTCA for deaths resulting from an explosion at Texas City, Texas, of ammonium nitrate fertilizer produced under the control of the United States for export purposes. The district court found that the explosion was due to the negligence of the government in adopting and planning the program, in failing to warn of the dangerous nature of the product and in failing to police the loading of the material on shipboard. The judgment for the plaintiff was reversed by the Fifth Circuit Court of Appeals.[56] The Supreme Court affirmed the court of appeals in a 4-3 decision authored by Justice Reed.[57] The majority held that all the activities alleged to have been negligently performed were within the discretionary function of the FTCA. As the Court stated:

> It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion.[58]

After an extensive analysis of the facts, the majority concluded that all the actions in question resulted from planning-level decisions and were therefore protected.[59]

In discussing the issue of the alleged negligence of the Coast Guard in fighting the fire caused by the explosion, the Court, relying on *Feres*, concluded that since there was no analogous private liability of fire-fighters in general tort law, there could be no liability on the part of the United States pursuant to the Act, which provided that the United States was liable if a "private person" would also have been liable under similar circumstances.[60] The *Dalehite* majority also considered the possibility of the United States being held strictly liable for the Texas City injuries, and concluded that it

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[54] 340 U.S. at 550.

[55] 346 U.S. 15 (1953).

[56] *In re* Texas City Litigation, 197 F.2d 771 (5th Cir. 1952).

[57] Neither Justice Douglas nor Justice Clark took part in the consideration or decision of the case. 346 U.S. at 45.

[58] *Id.* at 35-36.

[59] *Id.* at 42. In regard to the discretionary function analysis in *Dalehite, see generally* Matthews, *FTCA — The Proper Scope of the Discretionary Function Exception*, 6 AM. U.L. REV. 22 (1957); Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81, 93-98 (1968-1969); Comment, *Inadequacies of Federal Sovereign Immunity: A New Perspective*, 61 GEO. L.J. 1535 (1973).

[60] 346 U.S. at 43-44.

could not. This conclusion was based upon an interpretation of the legislative history which the Court felt indicated that the words "negligent and wrongful act or omission" of the Act were meant to require a showing of fault.[61]

A strong dissent by Justice Jackson, joined by Justices Frankfurter and Black, pointed out that the catastrophe resulted not from a policy decision at all but rather from negligent loading, handling and supervision, which were analogous to acts of a private manufacturer or shipper. The minority was concerned that the result of the majority decision was not to uproot the doctrine that "the King can do no wrong" as Congress had intended, but rather that the doctrine had "only been amended to read, the King can do only little wrongs."[62]

A flood of commentary followed the *Dalehite* decision, with most authors taking critical views.[63] Although *Dalehite* did not involve, as did the prior decisions before the Court, the question of who could recover under the Tort Claims Act, but rather for what action a successful claim would lie, the decision was hardly consistent with the Court's view in *Yellow Cab* of the FTCA as a sweeping waiver of immunity. At this point, predicting the future path of statutory interpretations of the Tort Claims Act was ill-advised; the Court was clearly struggling for an acceptable basis for construction.

III. Beyond *Feres* and *Dalehite*

In *United States v. Brown*,[64] the Court turned to a consideration of the scope of the *Feres* doctrine. In *Brown*, the Court held in a 6-3 decision that a discharged veteran could recover under the Tort Claims Act for an injury that occurred during hospitalization after discharge because the veteran was not "on active duty or subject to military discipline" and had "enjoyed a civilian status" when the injury occurred.[65] The Court refused to apply *Feres* and allowed recovery even though the plaintiff had already received compensation for his injury pursuant to the Independent Offices Appropriation Act of 1935.[66] The Court appeared inclined to limit *Feres* to its facts as it explained *Feres* as involving:

> [t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the

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[61] *Id.* at 45. For criticisms of this view, *see* Jacoby, *Absolute Liability Under the Federal Tort Claims Act*, 24 Fed B.J. 139 (1964); Peck, *Absolute Liability and the Federal Tort Claims Act*, 9 Stan. L. Rev. 433 (1957). *But see* Seavey, *"Liberal Construction" and the Tort Liability of the Federal Government*, 67 Harv. L. Rev. 994 (1954).

[62] 346 U.S. at 60.

[63] *See, e.g.*, Peck, *supra* note 30; 35 Neb. L. Rev. 509 (1956); 32 Tex. L. Rev. 474 (1954); 12 U. Miami L. Rev. 247 (1957).

[64] 348 U.S. 110 (1954).

[65] *Id.* at 112.

[66] Ch. 102, § 31, 48 Stat. 509, 523 (1934). Thus the "simple and uniform compensation system" that was a major factor in persuading the Court to find the FTCA inapplicable in *Feres*, carried little weight with the *Brown* court, although the Court adhered to the *Brooks* set-off principle for prior payments. 348 U.S. at 113. *See*, Jacoby, *supra* note 50, at 1286. *But see*, United States v. Demko, 285 U.S. 149 (1966).

> extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty . . . .[67]

In both its express pronouncements[68] and its limited interpretation of *Feres*, the Court indicated that it was giving a broader interpretation to the Tort Claims Act, and was not inclined to imply an additional exception to the Act for veterans injured after discharge.

The Court further restricted *Feres*, and *Dalehite* as well, a year later in *Indian Towing Co. v. United States*.[69] The issue there was whether the United States was liable for the Coast Guard's negligent maintenance of a lighthouse, which had resulted in a tugboat and barge running aground. The majority rejected the government's argument, successful in *Feres* and *Dalehite*, that liability could not lie against the United States because the operation of a lighthouse was a governmental activity that had no private counterpart. The Court felt that this distinction between governmental activities — those activities performed by the federal government without private counterparts — and proprietary activities, was not warranted by the legislative history of the FTCA and was contrary to the underlying philosophy of the FTCA to restrict governmental immunity. To accept this distinction would have excluded most government activity from the reach of the Tort Claims Act, since that is by definition "uniquely governmental," and would have plunged the federal courts into the "non-governmental-governmental quagmire" faced by the state courts.[70] This holding that the government may be liable for negligence in carrying out a function even if that function had no private analogue was a direct repudiation of the views stated in *Feres* and *Dalehite*.[71]

The retreat from the narrow view of the FTCA taken by the *Feres* and *Dalehite* Courts was continued two years later in *Rayonier v. United States*.[72] *Rayonier* involved the liability of the United States under the Tort Claims Act for the negligence of Forest Service employees in fighting a forest fire. The *Rayonier* Court made it clear that *Indian Towing* had rejected the theory that the United States was only liable when it acts in a "proprietary" as opposed to a "governmental" capacity. Justice Black's majority opinion construed the FTCA very broadly, indicating the Court's view that the purpose of the FTCA was "to establish novel and unprecedented governmental liability."[73] The Court interpreted congressional intent as seeking to relieve the economic burden of injury suffered by citizens by transferring it to the government, thus spreading the costs of such injuries among those who directly or indirectly

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[67] 348 U.S. at 112.

[68] The Court noted the "*broad pattern* of liability which the United States undertook by the Tort Claims Act." *Id.* (emphasis added).

[69] 350 U.S. 61 (1955).

[70] *Id.* at 65.

[71] This result was emphasized in the minority opinion written by Justice Reed. The minority indicated that a narrow interpretation was warranted and consistent with *Feres* and *Dalehite*. "It is certainly not necessary that every word in a statute receive the broadest possible interpretation. If Congress intended to create liability for all incidents not theretofore actionable against suable public agencies, that intention should be made plain." 350 U.S. at 75 (Reed, J., dissenting).

[72] 352 U.S. 315 (1957).

[73] *Id.* at 319.

benefitted from the activities.[74] Evidence of the Court's broad view of the beneficial purpose of the FTCA is found in the statement by the majority that "there is no justification for this Court to read exemptions into the Act beyond those provided by Congress."[75] In a footnote[76] that was to cause great confusion as to whether or not the Court still embraced the *Dalehite* view rejecting strict liability against the United States, the Court cited, apparently with favor, a Fourth Circuit opinion that had, in essence, allowed strict liability, *United States v. Praylou*.[77]

Thus, in three cases in succession, *Brown, Indian Towing* and *Rayonier*, the Supreme Court substantially changed the manner in which it construed the Federal Tort Claims Act.[78] This line of cases led many commentators to believe that the precedential value of *Feres* and *Dalehite* had been severely limited.[79]

The Supreme Court did not again rule on any significant cases involving the Tort Claims Act until 1963, when it decided the case of *United States v. Muniz*.[80] *Muniz* involved the question of whether or not prisoners in federal institutions were entitled to maintain actions against the United States for

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[74] *Id.* at 319-20.

[75] *Id.* at 320.

[76] *Id.* at 319 n.2.

[77] 208 F.2d 219 (4th Cir. 1953), *cert. denied*, 347 U.S. 934 (1954), *noted in* 23 GEO. WASH. L. REV. 106 (1954). In *Praylou*, the Fourth Circuit applied South Carolina's strict liability statute (S.C. Code § 2-6 (1952)), to arrive at liability against the United States for damage caused by a plane crash. The court distinguished *Dalehite* as applying only to possession of dangerous property, not damage actually inflicted by federal employees. The court reasoned that:

> It would be absolutely absurd to hold that the government is liable under the Tort Claims Act for the act of an employee who crashes into a house with a truck but not liable if he crashes into it with an airplane, and this on the theory that there is absolute liability under state law in the latter case but not in the former. The man on the street would never understand any such distinction; and in the minds of thoughtful lawyers, it would do little credit to the law.

208 F.2d at 295. The court was unperturbed by the argument that Congress did not intend for the United States to be liable in the absence of fault, because the effect of South Carolina law "was to make the infliction of injury or damage by the operation of an aeroplane a wrongful act in itself." 208 F.2d at 295.

Praylou was contrary to all other lower court decisions deciding the strict liability issue after *Dalehite*. *See* cases cited in Note, *Government Immunity From Strict Liability for Damages Caused by Sonic Boom*, 47 TUL. L. REV. 920, 922 n.19 (1973). For a conclusion that the "cryptic" citation of *Praylou* indicated that the Court in the future would limit the rationale of *Dalehite* in this regard, *see* Peck, *supra* note 61, at 935, and *see generally* Jacoby, *Absolute Liability Under the Federal Tort Claims Act*, 24 FED. B.J. 139 (1964); Comment, *Federal Liability for Sonic Boom Damage*, 31 S. CAL. L. REV. 259 (1958).

[78] This was due partly to a change in the composition of the bench and partly to a reversal of position, in favor of a broader concept of the Act, on the part of several of the justices. Only two members from the original unanimous *Feres* court took the same view in *Rayonier* — Justices Reed and Clark — who dissented. Chief Justice Warren and Justices Harlan and Brennan had replaced Chief Justice Vinton and Justices Jackson and Minton, all of whom had voted with the majority in *Feres*; Vinton and Minton had further voted with the majority in *Dalehite*. In addition Justices Douglas, Black and Burton all voted for a broader concept of the Act in *Rayonier* than they had in *Feres*. *See* Caruso, *An Analysis of the Evolution of the Supreme Court's Concept of the Federal Tort Claims Act*, 26 FED. B.J. 35 (1966); Peck, *supra* note 61, at 436 n.18.

[79] *See* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 25.09-.11 (1958); Gerwig, *A Decade of Litigation Under the Federal Tort Claims Act*, 24 TENN. L. REV. 301 (1957); Caruso, *supra* note 78; Pound *supra* note 22.

[80] 374 U.S. 150 (1963), *noted in* 35 MISS. L.J. 317 (1963), 38 ST. JOHN'S L. REV. 177 (1963); 15 SYR. L. REV. 124 (1963); 11 U.C.L.A. L. REV. 163 (1963).

injuries caused by the negligence of federal employees.[81] The Supreme Court, building upon the immediate past precedents, unanimously allowed recovery. Chief Justice Warren utilized the three-part test of examining the Act to determine whether it embraced the activity, determining whether the activity came within a statutory exception and examining the legislative history to determine whether Congress intended to include such claims under the FTCA. The Court concluded that Congress had indeed intended to permit such suits by federal prisoners.[82] Noting that *Feres* had been relied upon by the lower courts in denying prisoners' claims, the Court pointed out that parts of the *Feres* holding had been limited by *Indian Towing* and *Rayonier*, in that the FTCA "extends to novel and unprecedented liability."[83] Relying on *Brown*, the Court also stated, in dicta, that the presence of a compensation system of the type that had been persuasive in *Feres* did not bar a negligence suit.[84] As in *Brown*, the Court in *Muniz* was inclined to limit the *Feres* decision to the facts peculiar to servicemen.[85]

The Court's expansive language in referring to the purposes and effects of the FTCA was consistent with the precedents of *Yellow Cab, Brown, Indian Towing* and *Rayonier*. The decision spoke of the "general waiver of immunity" undertaken by the FTCA,[86] and noted that it provided much-needed relief to those injured by the negligence of government employees.[87] The Court also reiterated the view expressed in *Rayonier* that there was no justification, in light of the purposes and effects of the Act to read exemptions into the FTCA beyond those provided by Congress.[88]

Thus, by its decision in *Muniz*, the Court indicated its determination to maintain an expansive interpretation of the Federal Tort Claims Act. Through 1963, the Supreme Court had considered the substantive construction of the FTCA eight times in seventeen years, and six of those times had adopted a liberal view of the Act. The two cases in which the Court took a more narrow view, *Feres* and *Dalehite*, had been selectively limited and distinguished by the later cases so that their precedential value beyond situations of analogous fact patterns was suspect.[89]

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[81] Most lower courts that had considered the issue had denied prisoners' tort claims. James v. United States, 280 F.2d 428 (8th Cir.), *cert. denied*, 364 U.S. 845 (1960); Lack v. United States, 262 F.2d 167 (8th Cir. 1958); Jones v. United States, 249 F.2d 864 (7th Cir. 1957); Sigmon v. United States, 110 F. Supp. 906 (W.D. Va. 1953).

[82] In its determination of congressional intent, the Court found the following factors significant: the "plain import of the statutory language," the number of prisoners' claims among the applications for private bills prior to passage of the FTCA and the frequent mention of, but inaction upon, a prisoner-claims exception in the passage of the FTCA. 374 U.S. at 153-58.

[83] 374 U.S. at 159.

[84] *Id.* at 160. Only federal prisoners working in Federal Prison Industries were covered by any prison compensation scheme (about 18% of all prisoners). Woody, *Recovery by Federal Prisoners Under the Federal Tort Claims Act*, 36 WASH. L. REV. 338, 351 (1961). The *Muniz* plaintiffs were not covered, and this was noted by the Court.

[85] 374 U.S. at 162.

[86] *Id.* at 165.

[87] *Id.* at 166.

[88] *Id.* at 153.

[89] Professor Jacoby had cause to state that "[i]t is now generally recognized that *Feres* is a well-established but limited doctrine excluding from coverage under the Tort Claims Act military plaintiffs, broadly subject to military discipline who seek recovery for wrongs sustained

IV. The Supreme Court's Interpretation Through *Muniz*

In reviewing the Supreme Court decisions after *Dalehite* and through *Muniz*, certain characteristics and patterns emerge. It seems clear that the basis for interpreting the FTCA broadly rested on the Court's general distaste for the unfairness wrought by the concept of sovereign immunity. Throughout the majority opinions in these cases are statements reflecting the Court's recognition of the hardships falling on individuals barred from judicial relief by governmental immunity. The concern for the welfare of the individual that dominated the legal thinking of the Court during this period was naturally reflected through the Supreme Court's adoption of a "literal" reading of the FTCA, with a strict literal reading of the statutory exceptions so as to confine exceptions to those specifically enumerated by Congress. The refusal after *Feres* to imply judicial exceptions to the FTCA which would have further restricted those claimants entitled to relief, is of course consistent with this view.

Given this interpretation, the United States attorneys faced the difficult task of persuading the Court that despite statutory language to the contrary, and in the face of possible inequitable results to claimants, the Court should nevertheless find that Congress intended to retain governmental immunity in situations not covered by the statutory exceptions. The Court was not generally well-disposed to these arguments.

However, there was one area in which it appeared that perhaps the Court would be willing to find that recovery was not to be countenanced, and that encompassed those cases where the claimant had a remedy alternative to the FTCA in the form of some sort of statutory compensation scheme. On the one hand, this would appear to be a proper inquiry since one of the purposes of the FTCA, to extend a remedy to those who were without, is in theory accomplished by an adequate and fair compensation scheme. On the other hand, Congress did not make general exception for those covered by any federal compensation statute, and thus arguably did not intend to make, as it did for employees covered by the Federal Employee's Compensation Act (FECA),[90] such compensatory schemes the exclusive remedies for would-be claimants. The Court had embraced both views.[91]

'incident to service.' " Jacoby, *supra* note 50 at 1287. *See, e.g.*, Knoch v. United States, 316 F.2d 532 (9th Cir. 1963).

Many legal scholars had concluded that *Dalehite*, although never expressly overruled, no longer was the prevailing view. Hink and Schutter, *Some Thoughts on the American Law of Government Tort Liability*, 20 Rut. L. Rev. 710, 723 (1966); Peck, *supra* note 30. See also articles cited *supra* note 79. And *see* Laird v. Nelms, 406 U.S. 797, 808 (1973) (dissenting opinion of Justice Stewart).

[90] Federal Employees Compensation Act of 1966, Pub. L. No. 89-554, § 8116 (current version at 5 U.S.C. § 8116 (1976)). FECA was amended after the Court's decision in Brooks v. United States, 337 U.S. 49 (1949), to make it the exclusive remedy for federal employees who are injured while acting within the scope of their employment.

[91] In Brooks v. United States, 337 U.S. 49 (1949), the Court found the existence of veteran benefits no bar to the application of the FTCA, although since the Court saw "no indication that Congress meant the United States to pay twice for the same injury," it required a set-off of the benefits from any FTCA judgment. *Id.* at 53. *Accord* United States v. Brown, 348 U.S. 110, 113 (1954) (set-off of veteran disability benefits), and United States v. Muniz, 374 U.S. 150, 160 (dicta, that the existence of a compensation statute "does not of necessity" preclude a suit for negligence). *But see* Feres v. United States, 340 U.S. 135. 144 (1950). *See* notes 43-97 and accompanying text.

The question appears to have been settled three years after *Muniz* in *United States v. Demko*.[92] There, the Supreme Court held that federal prisoners who received disability payments for injuries sustained while performing assigned tasks in the Federal Prison Industries program[93] were precluded from recovering under the FTCA. The Court viewed the statute as analogous to workmen's compensation laws, which the Court had previously recognized as substitutes for common-law tort actions[94] and found the prison compensation statute to be an adequate substitute for FTCA relief. *Muniz* was distinguished as not involving prisoners protected by the prison compensation law.[95]

The Supreme Court's decision in *Demko* established that when a claimant had another adequate statutory remedy against the United States, the availability of such compensation would be considered persuasive evidence that the FTCA was not intended to apply to give the plaintiff a double recovery. However, the absence of such a remedy would still remain a significant burden for the government to overcome in showing that Congress intended to disallow recovery in the absence of the application of one of the statutory exceptions.

As mentioned above, the broad interpretation of the FTCA by the Court was well-founded in the dual purposes of the Act, to extend a remedy to those who had been without, and to greatly relieve Congress of the burden of considering private petitions for relief.[96] The Court further had found support for its broad view in the fact that Congress was free to amend the FTCA if it felt Court interpretations were going too far.[97]

In sum, the evolution throughout these years of the FTCA was towards an

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[92] 385 U.S. 149 (1966).

[93] 18 U.S.C. § 4121 et seq. (1976). The prisoner had been compensated pursuant to the provision that requires the Federal Prison Industries, Inc., a federal corporation, to use its funds "to compensate inmates or their dependants for injuries suffered in any industry or in any work activity in connection with the maintenance or operation of the institution where confined." 18 U.S.C. § 4126 (1976).

[94] *See* Johansen v. United States, 343 U.S. 472 (1952).

[95] Thus, for the first time since *Feres*, the Supreme Court "implied" an exception to the FTCA. The Court appeared to completely reject the dicta in *Muniz*, with the dissenters failing even to argue for the intermediate position (requiring a set-off) taken by the *Brooks* Court. (The main thrust of the dissent by Justice White was on a question of fact, whether or not the prison compensation statute was an adequate substitute for a FTCA remedy.) However the *Demko* decision did not represent a dramatic return to a narrow view of the FTCA. The composition of the Court that decided *Demko* was identical to that of the *Muniz* Court, save for the appointment of Justice Fortas, who succeeded to the position left vacant by the departure of Justice Goldberg. The decision did not actually overrule any prior decisions, and was unaccompanied by any language to indicate a shift in the manner of interpretation of the FTCA. The Court appeared merely to have espoused the narrow rationale that a claimant could not have two bites of the government apple. The main purposes of the FTCA were still met since the claimant was not left without a remedy. *Demko* is significant in that it firmly established that recovery under the FTCA is only permissible in the absence of an adequate statutory compensation substitute, since the presence of such a scheme is considered persuasive evidence of congressional intent that the compensation scheme is to be the exclusive remedy for would-be claimants.

[96] In Rayonier, Inc. v. United States, 352 U.S. 315, 320 (1957), the Court noted that, absent the FTCA, the claimant would have been left without a remedy: "[W]hen the entire burden falls on the injured party it may leave him destitute or grievously harmed. Congress could, and apparently did, decide that this would be unfair. . . ." *See also* United States v. Yellow Cab Co., 340 U.S. 543, 551-52 (1951).

[97] Compare the approach of the Court in *Feres*, where the Court denied the liability of the

expansive view of the congressional waiver of sovereign immunity. Underlying this interpretation was the view of the majority of the Court that the doctrine of sovereign immunity was inequitable. Since Congress intended to alleviate that inequity by enacting the FTCA, the Court was unwilling to limit the Act's effectiveness by either a narrow view of the waiver of immunity or an expansive view of the exceptions.

V. Recent Supreme Court Decisions

Except for *Demko*, it was not until almost ten years after the *Muniz* decision that the Supreme Court had occasion to make a major interpretation of the FTCA. Considerable changes had taken place in the composition of the Supreme Court during those years,[98] and the Burger Court had not theretofore spoken on the FTCA. The opportunity presented itself in *Laird v. Nelms*.[99] In granting certiorari,[100] the Court indicated its desire to finally resolve the issue of whether the United States would be strictly liable for its harmful activities in those states where private individuals would be liable. The claimant in *Nelms* sought recovery for damages to his home allegedly resulting from a sonic boom caused by a military aircraft flying over North Carolina on a training mission. The Fourth Circuit[101] had reversed the district court's grant of summary judgment for the defendant, and had followed its decision in *United States v. Praylou*,[102] which had permitted a recovery by the plaintiff and had distinguished the Supreme Court's discussion of the strict liability issue in *Dalehite*.

The Supreme Court overturned the decision by the Fourth Circuit, and held that strict liability would not lie against the United States under the FTCA. In essence, the majority revived the *Dalehite* opinion to the extent that *Dalehite* construed the FTCA to preclude the possibility of governmental liability absent any proof of a "negligent or wrongful act or omission." Justice Rehnquist, speaking for the majority, asserted that the discussion in *Dalehite* on the strict liability issue had been the holding of the case. He reasoned that *Dalehite* required the conclusion that the FTCA imposes a "uniform federal limitation on the types of acts committed by its employees for which the United States has consented to be sued."[103] Since under this view state law was then irrelevant to any consideration of whether an act was tortious, Justice Rehnquist turned to the terms of the statute itself. The opinion went on to reaffirm *Dalehite's* construction of "wrongful" as involving blameworthy

Government and contented itself with the knowledge that "if we misinterpret the Act, at least Congress possesses a ready remedy." 340 U.S. at 138; with the opposite approach in *Rayonier* and *Muniz*, where the Court allowed liability, stating that "[i]f the Act is to be altered that is a function for the same body that adopted it." Rayonier, Inc. v. United States, 352 U.S. at 320 (quoted in United States v. Muniz, 374 U.S. 150, 166 (1963)).

[98] Only Justices Douglas and White remained from the Court that decided *Muniz*, and only Justice Douglas was on the bench during the major evolution in the interpretation of the FTCA.

[99] 406 U.S. 797 (1972), *noted in* 6 Akron L. Rev. 105 (1973); 22 J. Pub. L. 219 (1973); 48 Notre Dame L. Rev. 727 (1973); 40 Tenn. L. Rev. 767 (1973); 47 Tul. L. Rev. 920 (1973); and 25 U. Fla. L. Rev. 408 (1973).

[100] 404 U.S. 1037 (1972).

[101] Nelms v. Laird, 442 F.2d 1163 (4th Cir. 1971), *noted in* 47 N.Y.U. L. Rev. 136 (1972).

[102] 208 F.2d 291 (4th Cir. 1953), *cert. denied*, 347 U.S. 934 (1954). *See* note 77 *supra*.

[103] 406 U.S. at 799.

conduct, thus barring any imposition of strict liability. After examining the legislative history, the majority concluded that Congress intended to exclude liability based solely on the ultrahazardous nature of the governmental activity.[104]

Justice Stewart, in a strong dissent, castigated the majority for ignoring the post-*Dalehite* decisions that had "implicitly abandoned" the holding in *Dalehite* that the FTCA did not permit suits in strict liability.[105] He criticized the majority's interpretation of the legislative history,[106] and questioned the policy behind a decision that would result in employees of the United States not being liable for damages caused by such ultra-hazardous activities as blasting, while private individuals would find themselves liable regardless of their precautions.[107]

The *Nelms* decision resulted in a tremendous outpouring of commentary critical of the decision.[108] Criticism was focused on the Court's reading of the legislative history of the FTCA;[109] the finding that the true holding of *Dalehite*, which appeared to clearly have been grounded upon an interpretation of the discretionary function exception, was instead grounded upon a denial of strict liability;[110] the corresponding failure of the Court to decide *Nelms* on the discretionary function exception and to give guidance to its effect;[111] the failure of the majority to examine the *Dalehite* analysis of strict liability in the perspective of later Supreme Court cases which appeared to overrule, or at least limit its effect;[112] and finally, the failure of the Court to be faithful to its previous interpretations of the policy underpinning the FTCA.[113]

This last point is especially worthy of note. The strict liability in tort

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[104] *Id.* at 801.

[105] *Id.* at 808.

[106] *Id.* at 805-06, nn. 3 & 4.

[107] *Id.* at 809.

[108] *See* articles cited *supra note 99. See also* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.08-.12 (Supp. 1976); Peck, *Laird v. Nelms: A Call for Review and Revision of the Federal Tort Claims Act*, 48 WASH. L. REV. 291 (1973); and Reynolds, *Strict Liability Under the Federal Torts Claims Act: Does "Wrongful" Cover a Few Sins, No Sins or Non-Sins?*, 23 AM. U. L. REV. 813 (1974).

[109] Most commentators have concluded that there is nothing in the legislative history which precludes absolute liability. *See* Reynolds, *supra* note 108, at 817-18; Comment, *Absolute Liability Under the Federal Tort Claims Act*, 60 MIL. L. REV. 53, 61 (1973); 6 AKRON L. REV. 105, 108 (1973); 48 NOTRE DAME L. REV. 727, 730-31 (1973). The Court's view of the legislative history necessarily conflicts with that part of the act which provides that the United States shall be liable in situations where a private person "would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1976). As discussed, this language was interpreted in both *Indian Towing* and *Rayonier* to mean that wherever a private individual would be liable under the law of the jurisdiction of the tort, so would the United States, and rejected the distinction between governmental and proprietary activities as far as the liability of the United States was concerned. The *Nelms* rationale necessarily implied that state law is not to be the measure of liability of the United States in all cases.

[110] 3 K. DAVIS, *supra* note 108; Peck, *supra* note 108, at 397-98.

[111] Clark, *Discretionary Function and Official Immunity: Judicial Forays into Sanctuaries from Tort Liability*, 16 A.F. L. REV. 33, 38 (1974).

[112] Many of the commentators have agreed with Justice Stewart, who, in his dissent, referring to the later decisions in *Indian Towing* and *Rayonier* stated that "[t]hese developments, together with an approving citation of the *Praylou* case in *Rayonier* . . . have until today been generally understood to mean that the language in *Dalehite* rejecting the absolute-liability doctrine had been implicitly abandoned." 406 U.S. at 808. *See also* Peck, *supra* note 108 at 396-97; 6 AKRON L. REV. 105, 107-08 (1973); 60 MIL. L. REV. 53, 60-62 (1973).

[113] Reynolds, *supra* note 108, at 833-35. *See also* Peck, *supra* note 108, at 411-12.

doctrine and the passage of the FTCA share similar underlying policy considerations: the belief that an innocent individual injured by another's activity should not be forced to shoulder the entire loss, and the idea that those enterprises (or governments) that undertake activities resulting in harm to others are better able to absorb and spread the cost of damage than any individual.[114] This philosophy was expressly recognized by the Supreme Court in *Indian Towing*.[115] Failure to give it recognition in *Nelms* marked a departure from the Court's tradition of giving the FTCA a broad interpretation.

In *Nelms*, the majority abandoned the philosophy of *Brown*, *Indian Towing*, *Rayonier* and *Muniz*, that there was no justification for the Court to read exceptions into the FTCA beyond those provided by Congress; in fact none of those decisions were even cited in the majority opinion. The *Nelms* result is that, contrary to express words of Congress requiring that the United States be liable under state law in the same capacity as a private citizen, there are situations in which the United States nonetheless will not be liable. The Court failed to properly consider the dual purposes of the Act with the effect that future claimants under strict liability theories would be left without any remedy for injury short of a petition to Congress for relief.[116] Rather than avail itself of an opportunity to further limit the doctrine of sovereign immunity, the Court instead chose to revitalize a barrier to recovery.

The Supreme Court next considered the boundaries of the FTCA in *Logue v. United States*,[117] although in a quite different context from that of *Nelms*. *Logue* involved the case of a federal prisoner who was arrested for allegedly conspiring to smuggle marijuana into Texas from Mexico. Logue was incarcerated in the Nueces County Jail, Corpus Christi, Texas, which was being used as a "contract jail" by the United States.[118] The following day Logue attempted suicide. He was removed to a hospital where a psychiatrist examined him and declared him to be psychotic, with suicidal tendencies, and recommended that he be transferred to another hospital equipped to treat his suicidal tendencies. The Deputy United States Marshall decided instead to return him to the county jail, and did so, advising the county jailers that Logue should be placed in a special cell barren of items with which he could injure himself. No arrangements were made to keep Logue under constant surveillance, and the next day Logue hanged himself with his arm bandage. Logue's parents brought suit under the FTCA claiming negligence on the part of the jailers and the Deputy Marshall. The pertinent issue was whether, for

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[114] Reynolds, *supra* note 108, at 834.

[115] Indian Towing Co. v. United States, 350 U.S. 61, 68 (1955).

[116] However, enterprising counsel in federal courts have persuasively utilized tort doctrines of liability other than absolute liability in order to prevent the harshness of the result as incurred in *Nelms*. *See, e.g.*, United States v. Hull, 195 F.2d 64 (1st Cir. 1952) (res ipsa loquitur); United States v. Gaidys, 194 F.2d 762 (10th Cir. 1952) (trespass); Adams v. Tennessee Valley Authority, 254 F. Supp. 78 (E.D. Tenn. 1965) (trespass); Grant v. United States, 326 F. Supp. 843 (W.D. Okla. 1970) (taking of property for public use). *See*, 60 MIL. L. REV. 53, 66-71 (1973); 40 TENN. L. REV. 767, 776 (1973). But these remedies are exceptional extensions of traditional tort doctrines and result in "an unequal and unpredictable application of the law that is bound to result in confusion and contempt for the judicial process." 60 MIL. L. REV. 53, 66 (1973).

[117] 412 U.S. 521 (1973).

[118] 18 U.S.C. § 4002 (1976), gives authority to the Federal Bureau of Prisons to contract with state prisons for the housing of federal prisoners.

purposes of the FTCA, the county jailers were "employees" of the United States, in which case the United States would be liable, or merely employees of an independent contractor (the county jail), a status for which Congress had specifically rejected liability on the part of the United States.[119] The Fifth Circuit[120] had reversed the district court's judgment that the United States was liable for the acts of the jailers, on the ground that the jail was an independent contractor, and any negligence on the part of its employees was not the negligence of the United States.

The Supreme Court unanimously upheld the reasoning of the Fifth Circuit.[121] In his opinion for the Court, Justice Rehnquist interpreted the language of the FTCA to adopt the "traditional distinction between employees of the principal and employees of an independent contractor with the principal,"[122] and indicated that the critical factor in determining if an individual can be considered an employee of the principal is whether or not the principal had the authority and power to control the physical performance of the independent contractor.[123] After examining the legislation that authorized the Bureau of Prisons to contract with state and local prisons, the Court concluded that Congress contemplated that operations of the contractor's facilities were to be within the control of the contractor.[124] Under the specific contract entered into with the Nueces County Jail, the United States had no authority to physically supervise the conduct of the jail's employees, and thus the majority concluded that the individuals were not employees of the federal government.[125]

The Court then addressed the question of whether or not the jail employees were "acting on behalf of a federal agency in an official capacity," since under the terms of the statute such individuals are to be considered "employees" of the United States,[126] and concluded that if these jailers were to fit within that appellation, the doors to governmental liability would be opened for the negligent acts of all employees of independent contractors,

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[119] The United States is liable under the FTCA for money damages "caused by the negligent or wrongful act or omission of any employee of the government. . . ." 28 U.S.C. § 1346(b)(1976). 28 U.S.C. § 2671 (1976) contains the following definition:

> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.
>
> "Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

[120] 459 F.2d 408 (5th Cir. 1972), *rehearing denied*, 463 F.2d 1340 (5th Cir. 1972).

[121] 412 U.S. 521 (1973). The case was vacated for a determination of the negligence of the Deputy Marshall. Justices Stewart and Marshall concurred in the judgment.

[122] 412 U.S. at 527.

[123] *Id.* at 527-28.

[124] 412 U.S. at 529.

[125] *Id.* at 530.

[126] 28 U.S.C. § 2671 (1976).

since independent contractors usually perform tasks that would otherwise be performed by federal employees.[127]

Logue can be criticized on several counts. Although the Court's decision to apply the "right of control" test, long used by the federal courts to determine whether a principal should be liable for the acts of another's employee,[128] was well-founded, the application of that doctrine in *Logue* was too mechanical. The Court found that the congressional legislation authorizing contract jails contemplated that the jails, not the government, were responsible for the control of federal prisoners, finding support for this view in the actual contract with the jail which gave the United States no authority to physically supervise the conduct of the jail's employees.[129] The Court thus considered the contractual status of the parties as determinative of the issue, without examining the actual degree of control imposed. However, it is likely that the contract jail would have complied with any federal requests regarding contract prisoners, and at the least, the jailers were not free of the control and influence of the United States Marshall.[130] In light of the broad manner in which the FTCA had been construed, and the intent of Congress to give it a sweeping reach, it would seem inappropriate for the Court to end the inquiry as to liability upon determination of the status of the parties, without examining whether or not the United States was actually exerting control over the employees of the jail.[131]

The Supreme Court itself, in a different context, had stated in *Reid v.*

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[127] *Id.* at 531-32.

[128] *See*, Annot., 57 A.L.R.2d 1448 (1958).

[129] 412 U.S. at 530.

[130] The D.C. Court of Appeals had held in Close v. United States 397 F.2d 686 (D.C. Cir. 1968), in a situation analogous to *Logue*, that the United States was liable for an injury suffered by a federal prisoner committed in the District of Columbia jail (a non-federal facility). The court emphasized:

> Since Congress has clearly committed the custody and safe-keeping of federal prisoners upon conviction to the Attorney General, then it must be true that, in this instance the D.C. jailer was serving as the Attorney General's jailer . . . it does not appear to the contrary in the record before us, that as to this federal prisoner, the Attorney General had some degree of power, commensurate with his continuing responsibility to supervise the D.C. jailer in his handling of this particular prisoner.

397 F.2d at 687. The *Logue* Court distinguished *Close* as not involving a contract jail. 412 U.S. at 532 n.8. In Witt v. United States, 462 F.2d 1261 (2d Cir. 1972), the Second Circuit determined that a civilian employee supervising military prisoners was "amenable to some degree of control" by the Commandant of the Disciplinary Barracks and was thus "acting on behalf of a federal agency in an official capacity, temporarily . . . in the service of the United States . . . without compensation." *Id.* at 1264. The Second Circuit expressly noted the intent of Congress was to give the FTCA "an expansive reach." *Id.* at 1263. The *Witt* case was dismissed by Justice Rehnquist as being contrary to the court of appeals determination in *Logue*. 412 U.S. at 532 n.8.

[131] For a recent opinion in which a court refuses to allow the contractual status of the parties to be determinative per se, *see* Costlow v. United States, 552 F.2d 560 (3d Cir. 1977). The case involved a collision of a mail truck with claimant's car. The court stated, in reference to a contract offered by the United States in support of a motion for summary judgment to show that a mail truck was in the service of an independent contractor, that: "[t]he crucial issue is whether the Postal Service exercised such control over the mail truck and its driver *despite* the contract, that the driver was actually an employee of the federal government within the meaning of the Federal Tort Claims Act rather than an employee of an independent contractor . . . [i]t cannot be said at this state of proceeding that there is no other evidence." 552 F.2d at 563 (emphasis added).

Covert[132] that "[i]t has long been settled that an officer, while holding prisoners for the United States, is the 'keeper of the United States' . . . and, as such, is an officer of the United States[133]. . . . Whether the Government should maintain its own jail in the District of Columbia, or utilize local facilities, is simply a matter of administrative convenience . . . ."[134] The Court concluded that "[f]or all practical purposes, the District of Columbia jail . . . is the 'jail of the United States' . . . and the Superintendent its keeper . . . [and] an employee of the United States . . . ."[135]

Finally, the Court in *Logue* expressed the belief that if it was to find that the county jailers were "employees" of the United States in the sense that they had "acted on behalf of a federal agency," the United States would be subjected to liability for almost all the negligent actions of its independent contractors.[136] That need not follow, however. For one thing, the actual language of the Act defines employees as including those who have "acted on behalf of a federal agency *in an official capacity*" (emphasis added).[137] The Court's opinion effectively ignores the "in an official capacity" qualification. The "official capacity" language[138] would seem to indicate that the United States would have to hold out to third parties that a particular contractor was empowered to act for it before liability would attach, a situation that did indeed exist in *Logue* but probably does not for the vast majority of independent contractors employed by the United States. It also can be argued that the United States has a special responsibility for the care and safety of federal prisoners, and should bear the ultimate responsibility when those in its charge are negligently injured.[139] In this way, governmental liability would still not lie against the United States should a member of the public be injured by an independent contractor's employee working on behalf of the government.

The Supreme Court again rejected a broad construction of "employee" for FTCA purposes three years later in the case of *United States v. Orleans*.[140] A

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[132] 351 U.S. 487 (1956). The case arose under 28 U.S.C. § 1252 (1976), which provided that:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree, or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

The question was whether or not the Superintendent of the District of Columbia jail was an "employee."

[133] 351 U.S. at 489-90.

[134] *Id.* at 490.

[135] *Id. But see* Randolph v. Donaldson, 13 U.S. (9 Cranch) 76 (1815), (holding a U.S. Marshal, who had entrusted a federal prisoner to a state jailer, not liable for the acts of the jailer in allowing the prisoner to escape). The situation in *Reid* was different from *Logue* in that in *Reid* the Superintendent of the District of Columbia jail was required by Congress to "receive and keep" federal prisoners. However, the United States still had no power to control the Superintendent's day-to-day activities, yet the *Reid* Court nevertheless found him to be an employee of the government "for all practical purposes." *Id.*

[136] 412 U.S. at 532.

[137] 28 U.S.C. § 2671 (1976).

[138] As the *Logue* Court noted, the legislative history "sheds virtually no light" on the congressional intent in enacting the "acting on behalf of" language. 412 U.S. at 530.

[139] This point was made in the dissent from denial of rehearing in the court of appeals. 463 F.2d 1340, 1342-43 (5th Cir. 1972).

[140] 425 U.S. 807 (1977).

local community-action agency, the Warren-Trumbull Council for Economic Opportunity, Inc. (WTCEO), established pursuant to Title II of the Economic Opportunity Act of 1964[141] and entirely funded by the Office of Economic Opportunity (OEO), had, through one of its "centers" scheduled a recreational outing. A van was furnished by the center, but since it was not large enough to transport all of the children interested in going, the WTCEO arranged for two men to drive the children to the outing in privately owned automobiles. The claimant was the father of one of the children injured when one of the cars struck a parked truck. The district court granted the government's motion for summary judgment on the ground that the WTCEO was not an agency of the United States. On appeal, the Sixth Circuit unanimously reversed.[142] The court of appeals read the FTCA in conjunction with the OEO, and concluded that since both were intended to remedy hardship, Congress could not have intended that those who sustain injury in the course of federally initiated, approved and funded programs be precluded from recovery under the FTCA. In an opinion by Chief Justice Burger, the Supreme Court unanimously reversed the court of appeals.[143]

The Chief Justice began his analysis by observing that "the Federal Tort Claims Act is a limited waiver of sovereign immunity . . . ,"[144] and stated that "[s]ince the United States can be sued only to the extent that it has waived its immunity, due regard must be given to the exceptions. . . ."[145] The Court relied on its decision in *Logue* to assert that the critical question in the case was whether or not WTCEO's day-to-day operations were supervised by the federal government. The Court concluded that it was "inconceivable" that Congress intended to waive its sovereign immunity in a case such as that presented by *Orleans*, since if federal funding was the standard upon which the government assumed the liability of entities carrying on its purposes, the United States would be liable to "countless unidentifiable classes of 'beneficiaries' " for activities over which it usually had no control.[146] Support for this conclusion was found in the legislative history, which indicated that Congress had contemplated the strengthening of community capabilities in the fight against poverty and the fact that the Economic Opportunity Act provided that a community action agency was to be administered by a community action board composed of local officials and representatives of other community groups.

The opinion made no mention of the issue of whether, if the WTCEO was not a federal agency, its employees nevertheless were "acting on behalf of a federal agency [the OEO] in an official capacity." The Court appeared to conclude without discussion that a finding that an agency was not a federal agency precluded a finding that the agency's employees could be "employees" of the government for purposes of the FTCA, regardless of the circumstances.[147]

[141] 42 U.S.C. §§ 2781-2837 (1976).

[142] 509 F.2d 197 (6th Cir. 1975).

[143] 425 U.S. 807 (1977).

[144] *Id.* at 813.

[145] *Id.* at 814. The Court cited *Dalehite* for this statement.

[146] *Id.* at 816.

[147] *Id.*

The problem with the *Orleans* decision is not necessarily the denial of liability on the part of the United States. It would have been a monumental decision for the Court to have held that local agencies funded and programmed by the United States were federal agencies within the purview of the FTCA, with the government being liable for acts of employees over which the government had no control. And as the Court pointed out, the economic and other consequences of such liability could have been staggering.[148] What was significant about *Orleans* was the Supreme Court's articulation of the view that the FTCA was a limited waiver of sovereign immunity. A protective attitude toward governmental liability was clear throughout the opinion. Additionally, the Court was certain that Congress had not intended the result of the court of appeals decision. But in light of the fact that this type of federal funding, with federal control, programming, and channeling of funds, is a relatively new phenomenon and likely not to have been contemplated during the passage of the FTCA, it would seem that the confidence the Court had in its view of the congressional intent was misplaced. Doubtless the spectre of the United States' greatly expanded liability was a significant factor in guiding the Court toward its decision.

In its most recent pronouncement on the FTCA, the Supreme Court addressed itself to an issue that had been disputed by the lower courts ever since its *Feres* decision: the issue of whether a private party defendant could implead the United States in a suit where a plaintiff/serviceman was barred from seeking recovery directly against the government because of the *Feres* doctrine; that is, whether the United States' immunity from liability to its servicemen in the line of duty also bars claims of third parties who, when sued by a serviceman, seek indemnification from the United States.[149] In *Stencel Aero Engineering Corp. v. United States*,[150] the Supreme Court, relying on the rationale of its decision in *Feres*, held that third-party liability would not lie against the United States in an action where the United States would not be liable to the original claimant.

In *Stencel*, Captain Donham, an Air Force Reserve pilot assigned for training to the Missouri National Guard,[151] was injured by a malfunction in his "life-support" system when he ejected from his aircraft in an emergency situation. Donham sued both the Stencel Aero Engineering Corporation (Stencel), which had manufactured the system, and the United States. Stencel denied liability and cross-claimed against the United States since it had designed the system to government specifications and the system was in the possession and under the control of the Air Force. Stencel's contention was

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[148] *Id.* at 815-16.

[149] *Compare* Donham v. United States, 536 F.2d 765 (8th Cir. 1976), *and* United Air Lines, Inc. v. Weiner, 335 F.2d 379 (9th Cir.), *cert. dismissed sub nom.*, United Air Lines, Inc. v. United States, 379 U.S. 951 (1964), *with* Barry v. Brezina Constr. Co., 464 F.2d 1141 (10th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973), *and* Wellington Transp. Co. v. United States, 481 F.2d 108 (6th Cir. 1973).

[150] 431 U.S. 666 (1977).

[151] It is generally accepted that members of the air national guard are members of the United States military, and the *Feres* doctrine has been uniformly applied against them. *See* Layne v. United States, 295 F.2d 433 (7th Cir. 1961), *cert. denied*, 368 U.S. 990 (1962); Peluso v. United States, 474 F.2d 605 (3d Cir.), *cert. denied*, 414 U.S. 879 (1973).

that if it was negligent, it was only passively negligent, while the United States was actively negligent and should be forced to indemnify Stencel.[152] The district court dismissed the United States as a party, on the basis of *Feres*, and also dismissed Stencel's cross-claim for indemnity upon the same ground. The Eighth Circuit affirmed.[153]

The Supreme Court affirmed the court of appeals in a 7-2 decision, in an opinion by Chief Justice Burger.[154] The majority conceived of the issue as a tug-of-war between the *Yellow Cab* doctrine that the FTCA had waived the government's immunity in sweeping language and the "equally well-established doctrine" of *Feres*.[155]

In reaching its decision, the Court relied solely on its decision in *Feres*, ignoring several of its own cases decided in other contexts[156] that arguably had held that third-party indemnification did lie against the United States when the original claimant was statutorily barred from proceeding against the government. Instead, the majority merely reviewed the factors of the *Feres* decision found determinative by the court of appeals, and found them conclusive. The first was the fact that the relationship between the government and its suppliers of ordnance, like that of the relationship between the government and its military, is "distinctively federal in character."[157] Such a finding, the Court felt, justified a finding of inapplicability of state tort law to the case. The majority found that the reasons for not allowing servicemen to be subject to state law were applicable to government contractors when an identical injury to the serviceman was involved. Second, the majority found that, even though the claimant had no remedy at all if it could not recover under the FTCA, unlike the claimant in *Feres*, Congress intended the military compensation scheme to be the "upper limit of liability for the Government as to service-connected injuries."[158] Third, a factor not made explicit in *Feres*, but explicated in *Brown* — the deleterious effects of suits by servicemen against their officers on military discipline — was found to be significant. The Court felt that military discipline would be impaired, since

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[152] For the theory of indemnification in tort, *see generally* Davis, *Indemnity Between Negligent Tortfeasors; A Proposed Rationale*, 37 IA. L. REV. 517 (1951); Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130 (1932).

[153] Donham v. United States, 536 F.2d 765 (8th Cir. 1976).

[154] 431 U.S. 666 (1977).

[155] *Id.* at 670. It is noteworthy that the majority did not grant that the FTCA had waived immunity in sweeping language, but rather noted that "*Petitioner argues* that '[t]he Federal Tort Claims Act waives the Government's immunity from suit in sweeping language.' United States v. Yellow Cab." (emphasis added). *Id.*

[156] The Supreme Court has ruled on three cases having a bearing on this issue: Ryan Stevedoring Co. v. Pan Atlantic Steamship Corp., 350 U.S. 124 (1956); Weyerhauser Steamship Co. v. United States, 372 U.S. 597 (1963); and Treadwell Constr. Co. v. United States, 372 U.S. 772 (1963). For a discussion of these cases and the issue generally when the third-party plaintiff seeks indemnification from the government and the injured party is covered by the Federal Employees Compensation Act, *see* Note, *Contribution and Indemnity Under the Federal Employees' Compensation Act*, 6 TOL. L. REV. 273 (1974). *See also* Annot., 12 A.L.R. FED. 616 (1972). Several commentators have concluded that the Supreme Court cases noted above support the proposition that indemnity should be allowed in the type of situation presented in the *Stencel* case. Jacoby, *supra* note 50, at 1289-93; 25 KAN. L. REV. 601, 605-07 (1977).

[157] 431 U.S. at 672. For a discussion of this language, *see* note 160, *infra*.

[158] *Id.* at 673.

any trial on the indemnification issue would essentially require examination of the same issues of fact as a suit against the military, would involve "second guessing military orders, and would often require members of the armed services to testify in court as to each other's decisions and actions."[159]

The determination of the Supreme Court to construe the FTCA very narrowly was exemplified clearly in *Stencel*, yet the reasoning and the result are indefensible. The *Stencel* majority made no mention or discussion of the history or purpose of the FTCA, which seems unwarranted in light of the failure of Congress to specifically address the problem in the FTCA itself. The majority appeared to feel that the *Feres* decision was completely dispositive of the issue in the case. This view completely failed to take into account the limits the Supreme Court had placed on the *Feres* decision in *Brown* and *Muniz*. Those cases were not even cited by the majority, or their rationales discussed or distinguished.

The resurrection of the "distinctively federal" language is unfortunate;[160] after *Feres* that phrase was never used again by the Court in an FTCA context. To conclude that the FTCA is not applicable because of the existence of such a "federal relationship" is to revive, through different rhetoric, the old "governmental/non-governmental" distinctions that had been struck down in *Rayonier* and *Indian Towing*. Suppliers of ordnance differ from other governmental suppliers only in that they usually have no other buyers for their products; only the federal government purchases from them. By concentrating upon the relationship of the parties, the Court has laid the groundwork for future anomalous results. For example, if an Army truck negligently collides with an ordnance supplier's truck while the latter is delivering parts to an Army base pursuant to a government contract, could Congress really be thought to intend federal common law to apply in such a situation on the grounds that the relationship between the supplier and the government is "distinctively federal in character"?[161] The "distinctively federal" phrase is

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[159] *Id.*

[160] The "distinctively federal in character" language has its origin in United States v. Standard Oil Co., 332 U.S. 301 (1947), in which the Court had concluded that the relationship between a serviceman and the government was "fundamentally derived from federal sources" and should be governed by federal authority. *Id.* at 305-06. The case arose in the context of an indemnity action by the United States where the government sought to receive indemnification from Standard Oil for medical expenses paid by it to a soldier injured when struck by one of the company's trucks. The Court refused to allow the indemnification, concluding that only Congress had the power to create liability in favor of the government in the form of indemnification; since Congress had failed to act, it was presumed to acquiese with the resulting "interference with federal funds." *Id.* at 315-16.

Standard Oil was decided prior to the effective date of the FTCA. By enacting the FTCA, Congress provided the statutory rule of decision that the Court felt was lacking in *Standard Oil*. The extent of the government's liability was to be determined pursuant to state law, under the same standards that a private individual would be liable. Thus, *Standard Oil* is a poor case to support any FTCA decision. And even if *Standard Oil* were otherwise applicable. the decision in *Stencel* is not consistent with it because the implication in *Standard Oil* was that, should Congress act, the courts would be obliged to respect the resulting rule of liability. In *Stencel*, after Congress had acted through the FTCA, the Court nevertheless concluded that a federal, not state, rule of decision should be applied.

[161] Petitioner's Brief at 33, Stencil Aero Engineering Corp. v. United States, 431 U.S. 666 (1977) suggests such a situation.

contrary to the express language of the Act requiring that the United States be liable according to "the law of the place where the act or omission occurred." It is hard to see, as the dissent pointed out, where the boundaries of the "distinctively federal" principle end;[162] the result will doubtless be to include an ever-increasing number of activities performed by the United States, insulating those activities from liability.

In addition, the reason upon which the Court rested its determination in *Feres* that state law was inapplicable — the unfairness in having the serviceman's action depend on the vagaries of state law — had no counterpart in *Stencel*. Manufacturing companies are accustomed to having claims against them depend on the laws of the states into which their products flow. There was no claim of unfairness to Stencel, nor could one be justified.

The Court's finding that third-party actions such as presented in *Stencel* were threats to military discipline also is not well-founded. As the dissent pointed out, the concern in *Feres*, as further articulated in *Brown*, with "[t]he peculiar and special relationship of the soldier to his superiors," is not present when a non-military third party brings suit.[163] The dissent noted that if the injured claimant had been a civilian, had sued the manufacturer and the manufacturer had sought indemnification from the government, there would be no doubt that such an action against the government would lie. Such an action could also involve "second-guessing military orders," and would require members of the armed services to testify in court as to each other's decisions, but would be a perfectly permissible action.[164] The Court's concern for the "second-guessing" of military orders in future litigation would seem groundless in light of the discretionary function exception to the FTCA, which, although not applicable in *Stencel*, would protect the military from the effects of its policy decisions and preclude liability whenever a claim stemmed from activity caused by orders of superior officers. The Court's evident failure to consider this no doubt caused it to be more concerned about the effect on military discipline than was warranted.

One of the principles underlying prior FTCA decisions of the Supreme Court was that Congress must have tacitly intended to exclude recovery whenever a claimant was covered by a simple and uniform compensation scheme, and conversely, when no such scheme was provided, there was a presumption toward finding liability on the part of the United States.[165] In *Stencel*, the Supreme Court ignored this principle of construction. The result there, which saddles the manufacturer with the whole liability, is also contrary to one of the purposes which impelled Congress to enact the FTCA — to remove the burden of private bills of relief from Congress. Since the company had no further remedy or source of compensation available to it, its only recourse would be to seek relief directly from Congress. This consideration

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[162] 431 U.S. at 677 (Marshal, J. dissenting).

[163] 431 U.S. at 676 (Marshall, J. dissenting).

[164] *Id.* at 676-77.

[165] *See* text accompanying notes 43-97 *supra*.

had been persuasive before, in *Yellow Cab*,[166] and was nonetheless so in *Stencel*.

The majority's decision leaves Stencel to suffer the damage incurred by the government's negligence (assuming that it could have been proven). The effect is to leave to third parties the responsibility and burden of fully compensating injuries to servicemen when the government is at fault.[167] Clearly, this is contrary to the broad, enlightened principles which the Supreme Court has enunciated in its prior decisions, and by again implying a judicial exception to the Tort Claims Act, the Supreme Court has barred another set of claimants from judicial relief.

VI. Conclusion

In the aftermath of the *Stencel* decision, the path that the Supreme Court has taken with respect to the interpretation of the Federal Tort Claims Act is clear. The Court has rejected the idea that the FTCA is a sweeping waiver of sovereign immunity, and has turned its back on the long line of cases which had applied such a statutory construction. Instead, the Supreme Court's view, as it stated in *Orleans*, is that the FTCA is a limited waiver of sovereign immunity. In so perceiving the intent of Congress to grudgingly relinquish immunity, the Supreme Court has given new life to its earlier decisions in *Feres* and *Dalehite* which had insulated the United States from liability.

The Supreme Court has even gone beyond the strict views of *Feres* with its decision in *Stencel*, since the effect is to leave the claimants completely without any remedy, short of a petition to Congress. The Court will refuse to indulge in the presumption, adopted in its earlier decisions, that absent a specific exception of the FTCA being applicable, failure of Congress to provide a statutory remedy weighs in favor of allowing recovery in close cases. This result is extremely unfortunate in light of the unfairness to the claimants, and is contrary to the dual purposes of the FTCA of allowing recovery to claimants who had been without a remedy, and avoiding the flood of petitions for private relief by Congress.

The basic doctrinal position of the Burger Court seems to be that the government is in need of fiscal protection from the tort claims of its citizens. Indeed, in none of its decisions construing the FTCA has the Burger Court allowed recovery against the United States. The Court is disregarding the caution of Justice Frankfurter in the *Indian Towing* case, to the effect that courts should not act as a "self-constituted guardian of the Treasury" in situations where legislatures have acted to limit sovereign immunity.[168] These

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[166] 340 U.S. 543 (1951). There the Court stated, vis-a-vis the effect of denying the liability of the United States for contribution:

> if the injured party recovered judgment against the private tortfeasor, it would mean that (despite local substantive law favoring contributory liability) that an individual could not sue the government for the latter's contributory share of the same damages. Presumably, the claimant would be relegated to a private bill for legislative relief. Such a result should not be read into this Act without a clearer statement of it than appears here.

Id. at 551-52.

[167] *Id.* at 675.

[168] Indian Towing Co. v. United States, 350 U.S. 61, 69 (1955).

decisions clearly prevent the further erosion of the sovereign immunity doctrine, and may represent the vestiges of a "judicial state of mind conditioned by the spectre that relinquishment [of immunity] will bankrupt the sovereign and result in governmental paralysis."[169]

Enough has been said previously, and in other legal commentary, to justify the conclusion that such a view is unnecessary, inequitable and unwarranted. Modern considerations of fairness and enterprise responsibility and risk-sharing, as well as applicable principles of statutory construction argue persuasively in favor of an expansive view of governmental liability. It is extremely regrettable that the Supreme Court has recently rejected these principles in favor of protecting the United States from the tort claims of its citizens. It is submitted that the government is adequately protected through the language of the FTCA and the statutory exceptions, and that it is both doctrinally unnecessary, and substantively inequitable, to judicially restrict access to redress. Given the present trend and thinking of the Supreme Court, however, the prospect of further limitation upon the activities for which the United States will be liable in tort, and further restrictions upon those who can recover, cannot be doubted.

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[169] Sherry, *The Myth That the King Can Do No Wrong: A Comparative Study of the Soverign Immunity Doctrine in the United States and the New York Court of Claims*, 22 AD. L. REV. 597, 614 (1970).